United Nations A/HRC/30/37

General Assembly

Distr.: General
6 July 2015

Original: English

Thirtieth session
Agenda item 3
Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Working Group on Arbitrary Detention

United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court

Summary

The present report is submitted pursuant to Human Rights Council resolution 20/16, in which the Council requested the Working Group on Arbitrary Detention to present to the Council before the end of 2015 draft basic principles and guidelines on remedies and procedures on the right of anyone deprived of his or her liberty by arrest or detention to bring proceedings before a court in order that the court may decide without delay on the lawfulness of his or her detention and order his or her release if the detention is not lawful. The United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court annexed to the present report are based on international law, standards and recognized good practice, and are intended to provide States with guidance on fulfilling, in compliance with international law, their obligation to avoid the arbitrary deprivation of liberty.

GE.15-11359(E)

Please recycle

1. The right of anyone deprived of his or her liberty to bring proceedings before a court, in order that the court may decide without delay on the lawfulness of his or her detention and obtain appropriate remedies upon a successful challenge, is widely recognized in international and regional human rights instruments, the jurisprudence of the International Court of Justice and of international human rights mechanisms, including in the reports and country visits of treaty bodies and special procedure mandate holders, regional human rights mechanisms, in the domestic law of States and the jurisprudence of national courts.

2. The right to challenge the lawfulness of detention before a court is a self-standing human right, the absence of which constitutes a human rights violation. It is a judicial remedy designed to protect personal freedom and physical integrity against arbitrary arrest, detention, including secret detention, exile, forced disappearance or risk of torture and other cruel, inhuman or degrading treatment or punishment. It is also a means of determining the whereabouts and state of health of detainees and of identifying the authority ordering or carrying out the deprivation of liberty.

3. This judicial remedy is essential to preserve legality in a democratic society. The effective exercise of this fundamental safeguard of personal liberty in all situations of deprivation of liberty, without delay and without exception, resulting in appropriate remedies and reparations, including an entitlement to release upon a successful challenge, must be guaranteed by the State. Numerous international and regional human rights bodies and instruments have articulated a strong position on the non-derogability in any circumstance of the right to bring such proceedings before a court. The Working Group on Arbitrary Detention urges all States to incorporate this position into their national laws. In practice, the absence of inclusive and robust national legal frameworks to ensure the effective exercise of the right to bring proceedings before a court has resulted in a protection gap for persons deprived of their liberty.

4. In this light, the Human Rights Council, in its resolution 20/16, requested the Working Group to present to the Council draft basic principles and guidelines on remedies and procedures on the right of anyone deprived of his or her liberty by arrest or detention to bring proceedings before a court in order that the court may decide without delay on the lawfulness of his or her detention and order his or her release if the detention is not lawful. The Working Group has complied closely with the request of the Council, that it seek the views of States, relevant United Nations agencies, intergovernmental organizations, treaty bodies and, in particular, the Human Rights Committee, other special procedures, national human rights institutions, non-governmental organizations and other stakeholders. In 2013, the Working Group distributed a questionnaire to stakeholders in which it requested details on the right to bring such proceedings in their respective legal framework.

5. The Working Group submitted to the Human Rights Council, at its twenty-seventh session, a thematic report on the international, regional and national legal frameworks on the right to challenge the lawfulness and arbitrariness of detention before court (A/HRC/27/47). In the report, the Working Group documented general practice accepted as law, and further best practices in applying the requirements of international law. States and other stakeholders continued to make submissions up until the final session, when the document was adopted, adding to the materials available to the Working Group.

6. On 1 and 2 September 2014, the Working Group convened a global consultation in Geneva to bring together experts to elaborate on the scope and content of the right to bring proceedings before a court and to receive without delay appropriate remedies, and to allow stakeholders to contribute to the development of the Basic Principles and Guidelines (see annex). The background paper drew on the thematic report submitted to the Council (A/HRC/27/47) to set out the substantive and procedural obligations of States to ensure the meaningful exercise of the right to bring proceedings before a court and current State

practice in implementing each of the obligations, highlighting several examples of good practice.

7. The Basic Principles and Guidelines, drawn from international standards and recognized good practice, are aimed at providing States with guidance on the fundamental principles on which the laws and procedures regulating the right to bring proceedings before a court should be based, and on the elements required for its effective exercise.

8. In the present Basic Principles and Guidelines, the terms "everyone", "anyone" or "any person" denote every human being without discrimination based on race, colour, sex, property, birth, age, national, ethnic or social origin, language, religion, economic condition, political or other opinion, sexual orientation or gender identity, disability or other status, and any ground that aims at or may result in undermining the enjoyment of human rights on a basis of equality. It includes, but is not limited to, girls and boys, soldiers, persons with disabilities, including psychosocial and intellectual disabilities, lesbian, gay, bisexual, transgender and intersex persons, non-nationals, including migrants regardless of their migration status, refugees and asylum seekers, internally displaced persons, stateless persons and trafficked persons and persons at risk of being trafficked, persons accused or convicted of a crime, persons who have or are suspected to have engaged in the preparation, commission or instigation of acts of terrorism, drug users, persons with dementia, human rights defenders and activists, older persons, persons living with HIV/AIDS and other serious communicable or chronic diseases, indigenous peoples, sex workers and minorities based on national or ethnic, cultural, religious and linguistic identity.

9. Deprivation of personal liberty is without free consent. For the purposes of the present Basic Principles and Guidelines, the term "deprivation of liberty" covers the period from the initial moment of apprehension until arrest, pretrial and post-trial detention periods. This includes placing individuals in temporary custody in protective detention or in international or transit zones in stations, ports and airports, house arrest, rehabilitation through labour, retention in recognized and non-recognized centres for non-nationals, including migrants regardless of their migration status, refugees and asylum seekers, and internally displaced persons, gathering centres, hospitals, psychiatric or other medical facilities or any other facilities where they remain under constant surveillance, given that may not only amount to restrictions to personal freedom of movement but also constitute the de facto deprivation of liberty. It also includes detention during armed conflicts and emergency situations, administrative detention for security reasons, and the detention of individuals considered civilian internees under international humanitarian law.

10. In the present Basic Principles and Guidelines, deprivation of liberty is regarded as "arbitrary" in the following cases:

(a) When it is clearly impossible to invoke any legal basis to justify the deprivation of liberty (such as when a person is kept in detention after the completion of his or her sentence, or despite an amnesty law applicable to the detainee, or when a person detained as a prisoner of war, is kept in detention after the cessation of effective hostilities);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights;

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the State concerned, is of such gravity as to give the deprivation of liberty an arbitrary character;

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy;

(e) When the deprivation of liberty constitutes a violation of international law for reasons of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability or other status, and which is aimed at or may result in ignoring the equality of human rights.

11. In deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law (see A/HRC/22/44, paras. 37-75), the Working Group restated its constant jurisprudence on the prohibition of all forms of arbitrary deprivation of liberty, and demonstrated that it is general practice accepted as law, constituting customary international law and a peremptory norm (*jus cogens*). In its annual report for 2013 (A/HRC/27/48), the Working Group restated that the prohibition of arbitrariness in the deprivation of liberty requires a strict review of the lawfulness, necessity and proportionality of any measure depriving anyone of their liberty; this standard of review is applicable at all stages of legal proceedings. In the interactive dialogue held at the twenty-second session of the Council, States gave general support for the conclusions of the deliberation. The present Basic Principles and Guidelines adopt the criteria laid out by the International Court of Justice in its judgement of 20 July 2012 concerning Questions relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*) when confirming the status of the prohibition of torture as a peremptory norm (*jus cogens*). The prohibition of arbitrary detention is supported by the widespread international practice and on the *opinio juris* of States. It appears in numerous international instruments of universal application and has been introduced into the domestic law of almost all States. Lastly, arbitrary detention is regularly denounced within national and international forums.

12. For the purposes of the present Basic Principles and Guidelines, deprivation of liberty is regarded as "unlawful" when it is not on such grounds and in accordance with procedures established by law. It refers to both detention that violates domestic law and detention that is incompatible with the Universal Declaration of Human Rights, general principles of international law, customary international law, international humanitarian law, as well as with the relevant international human rights instruments accepted by the States concerned. It also includes detention that may have been lawful at its inception but has become unlawful because the individual has served the entire sentence of imprisonment, following the expiry of the period for which the person was remanded into custody or because the circumstances that initially justified the detention have changed.

13. States employ different models to regulate the exercise of the right to bring proceedings before a court to challenge the arbitrariness and lawfulness of detention and to obtain appropriate remedies without delay. Although no specific model is endorsed in the principles and guidelines, States are encouraged to guarantee this right in law and in practice.

14. The Basic Principles and Guidelines are based on the recognition that States should take a series of measures to establish and/or to reinforce the procedural safeguards provided to persons deprived of their liberty.

15. The Working Group recalls the Preamble to the Charter of the United Nations, which refers to the determination of the peoples of the United Nations "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained". One of the purposes of the United Nations is "to maintain international peace and security" and, to that end, "to take effective collective measures for the prevention and removal of threats to the peace, and for the

suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace". Furthermore, according to Article 2 of the Charter, "all Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter". The Working Group recalls the reaffirmation in numerous Security Council resolutions, including in resolution 2170 (2014), of the duty of Member States to comply with all their obligations under international law, in particular international human rights, refugee and international humanitarian law, underscoring also that effective counter-terrorism measures and respect for human rights, fundamental freedoms and the rule of law are complementary and mutually reinforcing.

16. Recognizing that certain groups are more vulnerable when deprived of their liberty, the Basic Principles and Guidelines provide specific provisions for women and girls, children, persons with disabilities and non-nationals, including migrants regardless of their migration status, refugees, asylum seekers and stateless persons.

17. The scope of the Basic Principles and Guidelines is distinct from the right of anyone arrested or detained on a criminal charge to be brought promptly before a judge or other judicial authority and tried within a reasonable time or be released.

18. Nothing in the present Basic Principles and Guidelines should be interpreted as providing a lesser degree of protection than that provided under existing national laws and regulations and international and regional human rights conventions or covenants applicable to the liberty and security of person.

Annex

Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court

I. Principles

Principle 1
Right to be free from arbitrary or unlawful deprivation of liberty

1. Recognizing that everyone has the right to be free from arbitrary or unlawful deprivation of liberty, everyone is guaranteed the right to take proceedings before a court in order that that court may decide on the arbitrariness or lawfulness of the detention, and to obtain without delay appropriate and accessible remedies.

Principle 2
Responsibilities of the State and others

2. National legal systems at the highest possible level, including, where applicable, in the Constitution, must guarantee the right to take proceedings before a court to challenge the arbitrariness and lawfulness of detention and to receive without delay appropriate and accessible remedies. A comprehensive set of applicable procedures shall be enacted to ensure that the right is accessible and effective, including the provision of procedural and reasonable accommodation, for all persons in all situations of deprivation of liberty. The human and financial resources necessary shall be allocated to the administration of the justice system. The right to bring such proceedings before a court must also be protected in private relationships such that the duties apply to international organizations and, under certain circumstances, to non-State actors.

Principle 3
Scope of application

3. Any individual who is deprived of liberty in any situation by or on behalf of a governmental authority at any level, including detention by non-State actors that is authorized by domestic law, has the right to take proceedings before a court in the State's jurisdiction to challenge the arbitrariness and lawfulness of his or her deprivation of liberty and to receive without delay appropriate and accessible remedies. Exerting authority over any form of detention will constitute the effective control over the detention and make the detainee subject to the State's jurisdiction. Involvement in detention will give the State the duty to ensure the detainee's right to bring proceedings before a court.

Principle 4
Non-derogability

4. The right to bring proceedings before a court to challenge the arbitrariness and lawfulness of detention and to obtain without delay appropriate and accessible remedies is not derogable under international law.

5. The right is not to be suspended, rendered impracticable, restricted or abolished under any circumstances, even in times of war, armed conflict or public emergency that threatens the life of the nation and the existence of which is officially proclaimed.

6. The international law review of measures to accommodate practical constraints in the application of some procedural elements of the right to bring proceedings will depend upon the character, intensity, pervasiveness and particular context of the emergency and upon the corresponding proportionality and reasonableness of the derogation. Such measures must not, in their adoption, represent any abuse of power nor have the effect of negating the existence of the right to bring such proceedings before a court.

7. Any such practical measures in the application of the right to bring proceedings before a court to challenge the detention are permitted only to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are consistent with the State's other obligations under international law, including provisions of international humanitarian law relating to the deprivation of liberty, and are non-discriminatory.

Principle 5
Non-discrimination

8. The right to bring proceedings before a court to challenge the arbitrariness and lawfulness of detention and to receive without delay appropriate and accessible remedies may be exercised by anyone regardless of race, colour, sex, property, birth, age, national, ethnic or social origin, language, religion, economic condition, political or other opinion, sexual orientation or gender identity, asylum seekingor migration status, or disability or any other status.

Principle 6
The court as reviewing body

9. A court shall review the arbitrariness and lawfulness of the deprivation of liberty. It shall be established by law and bear the full characteristics of a competent, independent and impartial judicial authority capable of exercising recognizable judicial powers, including the power to order immediate release if the detention is found to be arbitrary or unlawful.

Principle 7
Right to be informed

10. Persons deprived of their liberty shall be informed about their rights and obligations under law through appropriate and accessible means. Among other procedural safeguards, this includes the right to be informed, in a language and a means, mode or format that the detainee understands, of the reasons justifying the deprivation of liberty, the possible judicial avenue to challenge the arbitrariness and lawfulness of the deprivation of liberty and the right to bring proceedings before the court and to obtain without delay appropriate and accessible remedies.

Principle 8
Time frame for bringing proceedings before a court

11. The right to bring proceedings before a court without delay to challenge the arbitrariness and lawfulness of the deprivation of liberty and to obtain without delay appropriate and accessible remedies applies from the moment of apprehension and ends with the release of the detainee or the final judgement, depending on the circumstances. The right to claim remedies after release may not be rendered ineffective by any statute of limitations.

Principle 9
Assistance by legal counsel and access to legal aid

12. Persons deprived of their liberty shall have the right to legal assistance by counsel of their choice, at any time during their detention, including immediately after the moment of apprehension. Upon apprehension, all persons shall be promptly informed of this right.

13. Assistance by legal counsel in the proceedings shall be at no cost for a detained person without adequate means or for the individual bringing proceedings before a court on the detainee's behalf. In such cases, effective legal aid shall be provided promptly at all stages of the deprivation of liberty; this includes, but is not limited to, the detainee's unhindered access to legal counsel provided by the legal aid regime.

14. Persons deprived of their liberty shall be accorded adequate time and facilities to prepare their case, including through disclosure of information in accordance with the present Basic Principles and Guidelines, and to freely communicate with legal counsel of their choice.

15. Legal counsel shall be able to carry out their functions effectively and independently, free from fear of reprisal, interference, intimidation, hindrance or harassment. Authorities shall respect the privacy and confidentiality of legal counsel-detainee communications.

Principle 10
Persons able to bring proceedings before a court

16. Procedures shall allow anyone to bring proceedings before a court to challenge the arbitrariness and lawfulness of the deprivation of liberty and to obtain without delay appropriate and accessible remedies, including the detainee, his or her legal representative, family members or other interested parties, whether or not they have proof of the consent of the detainee.

17. No restrictions may be imposed on the detainee's ability to contact his or her legal representative, family members or other interested parties.

Principle 11
Appearance of the detainee before the court

18. The court should guarantee the physical presence of the detainee before it, especially for the first hearing of the challenge to the arbitrariness and lawfulness of the deprivation of liberty and every time that the person deprived of liberty requests to appear physically before the court.

Principle 12
Equality before the courts

19. The proceedings shall be fair and effective in practice, and the parties to the proceedings in question shall be ensured the right to equal access to present their full case, and equality of arms, and be treated without any discrimination before the courts.

20. Every individual deprived of liberty shall be guaranteed the right to have access to all material related to the detention or presented to the court by State authorities to preserve the equality of arms. The requirement that the same procedural rights be provided to all parties is subject only to distinctions that are based on the law and can be justified on objective, reasonable grounds not entailing actual disadvantage or other unfairness to the detained person.

Principle 13
Burden of proof

21. In every instance of detention, the burden of establishing the legal basis and the reasonableness, necessity and proportionality of the detention lies with the authorities responsible for the detention.

Principle 14
Standard of review

22. No restriction may be imposed on the court's authority to review the factual and legal basis of the arbitrariness and lawfulness of the deprivation of liberty.

23. The court shall consider all available evidence that has a bearing on the arbitrariness and lawfulness of detention, namely, the grounds justifying the detention, and its necessity and proportionality to the aim sought in view of the individual circumstances of the detainee, and not merely its reasonableness or other lower standards of review.

24. In order to determine that a case of deprivation of liberty is non-arbitrary and lawful, the court shall be satisfied that the detention was carried out on grounds and according to procedures prescribed by national law and that are in accordance with international standards, and that, in particular, it was and remains non-arbitrary and lawful under both national and international law.

Principle 15
Remedies and reparations

25. Any person arbitrarily or unlawfully detained is guaranteed access to effective remedies and reparations capable of providing restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Reparations should be adequate, effective and prompt. States shall undertake prompt, effective and impartial investigations wherever there is reasonable ground to believe that detention has been arbitrary. The duty applies in any territory under a State's jurisdiction or wherever the State exercises effective control, or otherwise as the result of its actions or omissions of its servants. The right to reparation cannot be rendered ineffective by amnesties, immunities, statutes of limitations or other defence of the State.

26. Where a court determines that the deprivation of liberty is arbitrary or unlawful, it shall order a conditional or unconditional release from detention. Relevant authorities shall give immediate effect to any order for release.

Principle 16
Exercise of the right to bring proceedings before a court in situations of armed conflict, public danger or other emergency threatening the independence or security of a State

27. All detained persons in a situation of armed conflict as properly characterized under international humanitarian law, or in other circumstances of public danger or other emergency that threatens the independence or security of a State, are guaranteed the exercise of the right to bring proceedings before a court to challenge the arbitrariness and lawfulness of the deprivation of liberty and to receive without delay appropriate and accessible remedies. This right and corresponding procedural guarantees complement and mutually strengthen the rules of international humanitarian law.

28. Domestic legislative frameworks should not allow for any restriction on the safeguards of persons deprived of their liberty concerning the right to bring proceedings

before a court under counter-terrorism measures, emergency legislation or drug-related policies.

29. A State that detains a person in a situation of armed conflict as properly characterized under international humanitarian law, or in other circumstances of public danger or other emergency that threatens the independence or security of a State, has by definition that person within its effective control, and thus within its jurisdiction, and shall therefore guarantee the exercise of the right of the detainee to bring proceedings before a court to challenge the arbitrariness or lawfulness of the deprivation of liberty and to receive without delay appropriate and accessible remedies. Reconsideration, appeal or periodic review of decisions to intern or place in assigned residence alien civilians in the territory of a party to an international armed conflict, or civilians in an occupied territory, shall comply with the present Basic Principles and Guidelines, including Basic Principle 6 on the court as reviewing body.

30. Prisoners of war should be entitled to bring proceedings before a court to challenge the arbitrariness and lawfulness of the deprivation of liberty and to receive without delay appropriate and accessible remedies, where the detainee (a) challenges his or her status as a prisoner of war; (b) claims to be entitled to repatriation or transfer to a neutral State if seriously injured or ill; or (c) claims not to have been released or repatriated without delay following the cessation of active hostilities.

31. Administrative detention or internment in the context of a non-international armed conflict may only be permitted in times of public emergency threatening the life of the nation and the existence of which is officially proclaimed. Any consequent deviation from procedural elements of the right to bring proceedings before a court to challenge the arbitrariness and lawfulness of the deprivation of liberty and to receive without delay appropriate and accessible remedies must be in conformity with the present Basic Principles and Guidelines, including on the principles of non-derogability, the right to be informed and the court as reviewing body, and the guidelines on equality of arms and burden of proof.

32. During armed conflict, the deprivation of the liberty of children must only be a measure of last resort and for the shortest period of time. Basic legal safeguards must be provided in all circumstances, including for children deprived of liberty for their protection or rehabilitation, particularly if detained by military or security services. Safeguards include the right to legal assistance and a periodic review of the legality of the deprivation of their liberty by a court. The child has the right to have the deprivation of liberty acknowledged by the authorities and to communicate with relatives and friends.

Principle 17
Specific obligations to guarantee access to the right to bring proceedings before a court

33. The adoption of specific measures are required under international law to ensure meaningful access to the right to bring proceedings before a court to challenge the arbitrariness and lawfulness of detention and to receive without delay appropriate and accessible remedies by certain groups of detainees. This includes – but is not limited to children – women (in particular pregnant and breastfeeding women), older persons, persons detained in solitary confinement or other forms of incommunicado detention of restricted regimes of confinement, persons with disabilities, including psychosocial and intellectual disabilities, persons living with HIV/AIDS and other serious communicable or contagious diseases, persons with dementia, drug users, indigenous persons, sex workers, lesbian, gay, bisexual, transgender and intersex persons, minorities as based on national or ethnic, cultural, religious or linguistic identity, non-nationals, including migrants regardless of their

migration status, asylum seekers and refugees, internally displaced persons, stateless persons and trafficked persons or persons at risk of being trafficked.

Principle 18
Specific measures for children

34. Children may only be deprived of their liberty as a measure of last resort and for the shortest possible period of time. The right of the child to have his or her best interests taken as a primary consideration shall be paramount in any decision-making and action taken in relation to children deprived of their liberty.

35. The exercise of the right to challenge the arbitrariness and lawfulness of the detention of children shall be prioritized and accessible, age-appropriate, multidisciplinary, effective and responsive to the specific legal and social needs of children.

36. The authorities overseeing the detention of children shall *ex officio* request courts to review the arbitrariness and lawfulness of their detention. This does not exclude the right of any child deprived of his or her liberty to bring such proceedings before a court in his or her own name or, if it is in his or her best interests, through a representative or an appropriate body.

Principle 19
Specific measures for women and girls

37. Appropriate and tailored measures shall be taken into account in the provision of accessibility and reasonable accommodation to ensure the ability of women and girls to exercise their right to bring proceedings before a court to challenge the arbitrariness and lawfulness of detention and to receive without delay appropriate and accessible remedies. This includes introducing an active policy of incorporating a gender equality perspective into all policies, laws, procedures, programmes and practices relating to the deprivation of liberty to ensure equal and fair access to justice.

Principle 20
Specific measures for persons with disabilities

38. Courts, while reviewing the arbitrariness and lawfulness of the deprivation of liberty of persons with disabilities, shall comply with the State's obligation to prohibit involuntary committal or internment on the grounds of the existence of an impairment or perceived impairment, particularly on the basis of psychosocial or intellectual disability or perceived psychosocial or intellectual disability, as well as with their obligation to design and implement de-institutionalization strategies based on the human rights model of disability. The review must include the possibility of appeal.

39. The deprivation of liberty of a person with a disability, including physical, mental, intellectual or sensory impairments, is required to be in conformity with the law, including international law, offering the same substantive and procedural guarantees available to others and consistent with the right to humane treatment and the inherent dignity of the person.

40. Persons with disabilities are entitled to be treated on an equal basis with others, and not to be discriminated against on the basis of disability. Protection from violence, abuse and ill-treatment of any kind must be ensured.

41. Persons with disabilities are entitled to request individualized and appropriate accommodations and support, if needed, to exercise the right to challenge the arbitrariness and lawfulness of their detention in accessible ways.

Principle 21
Specific measures for non-nationals, including migrants regardless of their migration status, asylum seekers, refugees and stateless persons

42. Non-nationals, including migrants regardless of their status, asylum seekers, refugees and stateless persons, in any situation of deprivation of liberty shall be informed of the reasons for their detention and their rights in connection with the detention order. This includes the right to bring proceedings before a court to challenge the arbitrariness and lawfulness and the necessity and proportionality of their detention, and to receive without delay appropriate and accessible remedies. It also includes the right of the above-mentioned persons to legal assistance in accordance with the basic requirement of prompt and effective provision of legal assistance, in a language that they use and in a means, mode or format they understand, and the right to the free assistance of an interpreter if they cannot understand or speak the language used in court.

43. Irrespective of the body responsible for their detention order, administrative or other, such non-nationals shall be guaranteed access to a court of law empowered to order immediate release or able to vary the conditions of release. They shall promptly be brought before a judicial authority before which they should have access to automatic, regular periodic reviews of their detention to ensure that it remains necessary, proportional, lawful and non-arbitrary. This does not exclude their right to bring proceedings before a court to challenge the lawfulness or arbitrariness of their detention.

44. Proceedings of challenges to decisions regarding immigration detention must be suspensive to avoid expulsion prior to the case-by-case examination of migrants in administrative detention, regardless of their status.

45. The deprivation of liberty as a penalty or punitive sanction in the area of immigration control is prohibited.

46. The deprivation of liberty of an unaccompanied or separated migrant or of an asylum-seeking, refugee or stateless child is prohibited. Detaining children because of their parents' migration status will always violate the principle of the best interests of the child and constitutes a violation of the rights of the child.

II. Guidelines

Guideline 1
Scope of application

47. The right to bring proceedings before a court to challenge the arbitrariness and lawfulness of detention and to receive without delay appropriate and accessible remedies is applicable:

(a) To all situations of deprivation of liberty, including not only to detention for purposes of criminal proceedings but also to situations of detention under administrative and other fields of law, including military detention, security detention, detention under counter-terrorism measures, involuntary confinement in medical or psychiatric facilities, migration detention, detention for extradition, arbitrary arrests, house arrest, solitary confinement, detention for vagrancy or drug addiction, and detention of children for educational purposes;

(b) Irrespective of the place of detention or the legal terminology used in the legislation. Any form of deprivation of liberty on any ground must be subject to effective oversight and control by the judiciary.

Guideline 2
Prescription in national law

48. A strict legality requirement is applicable to both the form of the legal basis and the procedure for its adoption. The legal framework that establishes the process to challenge the arbitrariness and lawfulness of detention shall have a sufficient degree of precision, be drafted in clear and unambiguous language, be realistically accessible and ensure that the exact meaning of the relevant provisions and the consequences of its application are foreseeable to a degree reasonable for the circumstances.

49. Any restriction on liberty must be authorized in national legislation. Depending on the national legal system, restrictions may be based on the Constitution or in the common law. Legislative acts are to be drafted in accordance with the procedural provisions of the Constitution.

Guideline 3
Non-derogability

50. In times of public emergency threatening the life of the nation and the existence of which is officially proclaimed, States may take measures to accommodate practical constraints in the application of some procedural elements of the right to bring proceedings before a court to challenge the arbitrariness and lawfulness of detention and to obtain without delay appropriate and accessible remedies only to the extent strictly required by the exigencies of the situation, provided that:

(a) The court's authority to decide without delay on the arbitrariness and lawfulness of detention, and to order immediate release if the detention is not lawful, is not itself diminished;

(b) The duty of relevant authorities to give immediate effect to an order for release is not diminished;

(c) Such measures are prescribed by law, necessary in the exigencies of the situation (including by virtue of the fact that less restrictive measures would be insufficient to achieve the same purpose), proportionate and non-discriminatory;

(d) Such measures apply temporarily, only for as long as the exigencies of the situation require, and are accompanied by mechanisms to review periodically their continued necessity and proportionality;

(e) Such measures are consistent with ensuring fair, effective and adversarial proceedings;

(f) Such measures are not otherwise inconsistent with international law.

Guideline 4
Characteristics of the court and procedural guidelines for review of the detention

51. The court reviewing the arbitrariness and lawfulness of the detention must be a different body from the one that ordered the detention.

52. The competence, independence and impartiality of such a court should not be undermined by procedures or rules pertaining to the selection and appointment of judges.

53. In undertaking the review of the detention, the court has the authority:

(a) To consider the application as a matter of urgency. Adjudication of the case, including time for preparation of the hearing, should take place as expeditiously as possible, and should not be delayed because of insufficiency of

evidence. Delays attributable to the detainee or his or her legal representative do not count as judicial delay;

(b) To ensure the presence of the detainee regardless of whether he or she has asked to appear;

(c) To order immediate release if the detention is found to be arbitrary or unlawful. Any court order of release shall be respected and immediately implemented by the State authorities;

(d) To render and publicize its decision on the arbitrariness and lawfulness of the detention without delay and within established deadlines. In addition to being reasoned and particularized, the court's decision should be clear, precise, complete and sufficient, the contents of which should be made understood in a language and a means, mode or format that the detainee understands. In the event of an unsuccessful challenge, the court, in its decision, must provide reasons for why the individual should remain in detention in the light of the principle that liberty should be the rule and detention the exception. If further restrictions on the liberty of the individual are under consideration, such consideration shall be dealt with in compliance with the principles of international law;

(e) To take measures against the State authorities in control of the detention where the deprivation of liberty is determined to be arbitrary or unlawful and/or the treatment during the deprivation of liberty was found to be abusive.

54. For certain forms of detention, States may, exceptionally, enact legislation regulating proceedings before a specialized tribunal. Such a tribunal:

(a) Must be established by law affording all guarantees of competence, impartiality and the enjoyment of judicial independence in deciding legal matters in proceedings that are judicial in nature;

(b) May only be considered legitimate and legally valid if reasonable and objective criteria justify its existence, that is, there exists a special legal condition and/or vulnerability of the person that requires specific protection by a specialized tribunal. The right to equality before the law and to equal protection of the law without any discrimination does not make all differences of treatment discriminatory. Differentiation based on reasonable and objective criteria does not amount to prohibited discrimination.

55. Military tribunals are not competent to review the arbitrariness and lawfulness of the detention of civilians. Military judges and military prosecutors do not meet the fundamental requirements of independence and impartiality.

Guideline 5
Right to be informed

56. The factual and legal basis for the detention shall be disclosed to the detainee and/or his or her representative without delay so as to provide adequate time to prepare the challenge. Disclosure includes a copy of the detention order, access to and a copy of the case file, in addition to the disclosure of any material in the possession of the authorities or to which they may gain access relating to the reasons for the deprivation of liberty.

57. In any facility where persons are deprived of their liberty, the detaining authorities must inform detainees of their entitlement to bring proceedings and to receive a reasoned and individualized decision without delay, including on how to commence the procedure and potential consequences of voluntarily waiving those rights.Such information should be provided in a manner that is gender- and culture-sensitive and corresponds to the needs of

specific groups, including illiterate persons, minorities, persons with disabilities, older persons, indigenous peoples, non-nationals, including migrants regardless of their migration status, refugees, asylum seekers, stateless persons and children. The information shall be provided in a language and a means, mode or format that is accessible and that the said persons understand, taking into account augmentative and alternative means of communications for persons with a mental or physical impairment. In the case of children, information must be provided in a manner appropriate to their age and maturity.

58. Means of verification that a person has actually been informed shall be established. These means may include documentation of the person having been informed by way of printed record, audiotape, videotape or witnesses.

59. The above-mentioned information should also be widely published and made accessible to the general public and to geographically isolated groups and groups marginalized as a result of discriminatory practices. Use should be made of radio and television programmes, regional and local newspapers, the Internet and other means, in particular following any changes to the law or specific issues affecting a community.

Guideline 6
Registers and record-keeping

60. To ensure the accuracy and completeness of registers and adequate case management, and to ensure that State authorities know at all times who is held in their custody or detention facilities, including prisons and any other place of deprivation of liberty:

(a) All records must contain the following minimum information, disaggregated by sex and age of the detainee:

(i) The identity of the person;

(ii) The date, time and place where the person was deprived of liberty, and the identity of the authority that deprived the person of liberty;

(iii) The authority that ordered the deprivation of liberty and the grounds for it;

(iv) The authority responsible for supervising the deprivation of liberty;

(v) The place of deprivation of liberty, the date and time of admission to the place of deprivation of liberty, and the authority responsible for the place of deprivation of liberty;

(vi) Relevant information on the detainee's state of health;

(vii) In the event of death of the detainee during the deprivation of liberty, the circumstances and cause of death and the destination of the remains;

(viii) The date and time of release or transfer to another place of detention, the destination and the authority responsible for the transfer;

(b) Known procedures must be in place to safeguard against unauthorized access or modification of any information contained in the register and/or records of persons deprived of liberty;

(c) The registers and/or records of persons deprived of liberty shall be made promptly available, upon request, to any judicial or other competent authority or institution authorized for that purpose by the law;

(d) Known procedures must be in place to release immediately a detainee upon discovery that he or she is continuing to be detained despite having completed serving a sentence or detention order;

(e) In the event of non-compliance with such requirements, sanctions against the State authorities responsible are necessary.

Guideline 7
Time frame for bringing proceedings before a court

61. To ensure that an individual is not be deprived of his or her liberty without being given an effective opportunity to be heard without delay by a court of law, no substantial waiting period shall exist before a detainee can bring a first challenge to the arbitrariness and lawfulness of detention. Authorities shall facilitate the detainee's right to bring proceedings before a court and immediate access to legal counsel to prepare the detainee's case.

62. Given that circumstances can change and lead to the possibility that a previous legal justification for a detention is no longer applicable, detainees should have the right to challenge their detention periodically.

63. After a court has held that the circumstances justify the detention, the individual is entitled to take proceedings again on similar grounds after an appropriate period of time has passed, depending on the nature of the relevant circumstances.

64. There shall be no substantial waiting period between each application and no waiting period in cases of alleged torture or other ill-treatment, or risk of such treatment, or incommunicado detention, or where the life, health or legal situation of the detainee may be irreversibly damaged.

65. The initiation of the challenge multiple times does not relieve authorities of the obligation to ensure the regular, periodic judicial or other review of the necessity and proportionality of continuing detention, nor exclude the possibility of periodic review by the court *proprio motu*.

66. Where a decision upholding the arbitrariness and lawfulness of detention is subject to appeal in accordance with national legislation, it should be adjudicated upon expeditiously. Any appeals by the State are to be filed within legally defined limits and circumstances.

Guideline 8
Assistance by legal counsel and access to legal aid

67. Access shall be provided without delay to legal counsel immediately after the moment of deprivation of liberty and at the latest prior to any questioning by an authority, and thereafter throughout the period of detention. This includes providing detainees with the means to contact legal counsel of their choice.

68. Effective legal aid shall be provided promptly after the time of apprehension in order to ensure that the unaffordable cost of legal counsel does not present a barrier to individuals deprived of their liberty, or his or her representative, without adequate means to bring proceedings before a court.

69. Respect for the confidentiality of communications, including meetings, correspondence, telephone calls and other forms of communications, with legal counsel are to be ensured. Such communications may be held in the sight of officials provided that they are conducted out of their hearing. In the event that confidentiality is broken, any information obtained shall be considered inadmissible as evidence.

70. Access to legal counsel should not be unlawfully or unreasonably restricted. If access to legal counsel is delayed or denied, or detained persons are not adequately informed of their right to assistance by legal counsel in a timely manner, a range of remedies shall be available in accordance with the present Basic Principles and Guidelines.

71. Where the services of legal counsel are not available, every effort shall be made to ensure that services available from suitably qualified legal assistance providers are accessible to detainees under conditions that guarantee the full respect of the rights of detainees as set out in international law and standards.

Guideline 9
Persons able to bring proceedings before a court

72. A wider group of individuals with a legitimate interest in the case may bring proceedings before a court, including family members, caregivers or legal guardian of the detainee, State authorities independent of the detaining authority, the ombudsman or national human rights institution, non-governmental organizations, the employer or co-workers.

73. When proceedings are initiated by a person other than the detainee, the court shall make every effort to discover the detained person's will and preferences, and accommodate and support the detained person in participating effectively on his or her own behalf.

74. An informal, cost-free and simplified process to bring such proceedings before a court shall be ensured.

Guideline 10
Appearance before the court

75. To ensure the effectiveness and fairness of proceedings and to strengthen the protection of detainees from other violations, such as torture or other ill-treatment, a court should guarantee the physical presence of the detainee before it, in particular for the first hearing of the challenge to the arbitrariness and lawfulness of the deprivation of liberty and every time that the person deprived of liberty requests to appear physically before the court. This shall be ensured through implementation of the following measures:

(a) Any person deprived of his or her liberty, and not only persons charged with a criminal offence, shall enjoy the right to appear promptly before a court in order to challenge the deprivation of liberty and the conditions of detention, including acts of torture and ill-treatment;

(b) The court shall ensure that the detainee may communicate with the judge without the presence of any official involved in his or her deprivation of liberty;

(c) State authorities having control over the detainee who fail in their obligation to produce without unreasonable delay the detained person before the court, on demand of that person or by court order, should be sanctioned as a matter of criminal and administrative law.

Guideline 11
Equality of arms

76. To ensure that the procedure is guided by the adversarial principle and equality of arms, the following conditions shall be guaranteed in all proceedings, whether of a criminal or non-criminal nature:

(a) Full and complete access by detainees and their legal counsel to the material related to the detention or presented to the court, as well as a complete copy of them;

(b) The ability of detainees to challenge any documents relating to their case file, including all the arguments and material elements adduced by the authorities, including the prosecution, the security apparatus and the immigration authorities, to justify the detention, which may be determinative in establishing the arbitrariness and lawfulness of his or her detention.

Guideline 12
Admissibility of evidence obtained by torture or other prohibited treatment

77. Any statement established to have been made or any other evidence obtained as a result of torture or other cruel, inhuman or degrading treatment shall not be invoked as evidence in any proceedings, except against a person accused of torture or other prohibited treatment as evidence that the statement was made or that other such acts took place.

Guideline 13
Disclosure of information

78. The detaining authority shall provide all relevant information to the judge, the detainee and/or his or her lawyer. Disclosure is to include exculpatory information, which includes not only information that establishes an accused person's innocence but also other information that could assist the detainee, for example, in arguing that his or her detention is not lawful or that the reasons for his or her detention no longer apply.

79. Sanctions, including criminal penalties, shall be imposed on officials who withhold or refuse to disclose information relevant to the proceedings or who otherwise delay or obstruct proceedings.

80. The disclosure of information may be restricted only if the court concludes that:

(a) A restriction on disclosure is demonstrated to be necessary to pursue a legitimate aim, such as protecting national security, respecting the rights or reputation of another individual or protecting public order, health or morals, as long as such restrictions are non-discriminatory and consistent with relevant standards of international law;

(b) It has been demonstrated that less restrictive measures would be unable to achieve the same result, such as providing redacted summaries of information that clearly point to the factual basis for the detention.

81. Any proposed restriction on the disclosure of information is to be proportionate. An assessment of proportionality requires a balance between how well the non-disclosure protects the legitimate aims being pursued and the negative impact that this will have on the ability of the person to respond to the case or to pursue a challenge to the arbitrariness and lawfulness of detention. If a less restrictive measure is able to achieve the legitimate aim, the more restrictive measure is to be refused.

82. If the authorities refuse to make the disclosure and the court does not have the authority to compel such a disclosure, the court must order the release of the person detained.

Guideline 14
Burden of proof

83. The State authorities shall establish before the court that:

(a) The legal basis for the detention in question is in conformity with international standards;

(b) The detention is justified in accordance with the principles of necessity, reasonableness and proportionality;

(c) Other less intrusive means of achieving the same objectives have been considered in the individual case.

84. The burden of proof must be met in a manner that is known in detail to the detainee, complete with supporting evidence, including those who are defendants in security-related cases.

Guideline 15
Standard of review

85. When reviewing the arbitrariness and lawfulness of the detention, the court is empowered:

(a) To examine and act on the elements of inappropriateness, injustice, lawfulness, legality, predictability, and due process of law, and on basic principles of reasonableness, proportionality and necessity. Such an examination will take into account details such as age, gender and marginalized groups;

(b) To consider whether the detention remains justified or whether release is warranted in the light of all the changing circumstances of the detained individual's case, including health, family life, protection claims or other attempts to regularize one's status;

(c) To consider and make a pronouncement on whether alternatives to detention have been considered, including non-custodial alternatives to detention in accordance with the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) and the United Nations Rules on the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules);

(d) To take into account any orders of detention made subsequent to the commencement of court proceedings and prior to the rendering of the court's decision.

86. When assessing whether the measures taken are in compliance with international standards, the prohibition of particular grounds of detention or forms of detention are to be complied with, and the needs of specific persons affected and any vulnerability are to be taken into consideration, given that the arbitrariness and unlawfulness of detention may include the unsuitability of detention for the persons in question.

Guideline 16
Remedies and reparations

87. Judicial orders of release must be executed as soon as they become operative, as continued detention would be considered arbitrary.

88. A copy of the decision finding the detention arbitrary or unlawful is to be transmitted to the person concerned, with notification of the procedures for obtaining reparations. The person has the right to full compensation for material harm, elimination of the consequences of material harm and restoration of all rights that were either denied or infringed.

89. In the event of a detainee's death, the right to compensation in accordance with established procedures falls to the detainee's heirs.

90. The enforceable right to receive compensation for anyone determined to have been arbitrarily or unlawfully detained and for any harm suffered by the person as a result of unlawful deprivation of liberty, irrespective of whether the detaining authorities were responsible for such harm, shall be regulated by comprehensive legislation. Compensation shall also be made available to persons subjected to criminal charges that were subsequently dropped.

91. Compensation out of the public treasury of the State, federal entity or municipality for material damage suffered by a victim of arbitrary of unlawful detention may include earnings, pensions, social benefits and other monies lost as a result of the criminal prosecution; any property of the victim that was seized or otherwise appropriated by the State on the basis of a conviction or court ruling; compensation for lack of health care, rehabilitation, and accessible and reasonable accommodation in the place of detention; fines and trial costs borne by the victim as a result of the enforcement of the conviction; the victim's legal costs; and other costs.

92. Victims of arbitrary or unlawful detention shall, in accordance with the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, also have an enforceable right before the competent domestic authority to prompt and adequate:

(a) Restitution;

(b) Rehabilitation;

(c) Satisfaction;

(d) Guarantees of non-repetition.

Guideline 17
Exercise of the right to bring proceedings before a court in situations of armed conflict, public danger or other emergency threatening the independence or security of a State

93. Where persons who have or are suspected to have engaged in the preparation, commission or instigation of acts of terrorism are deprived of their liberty:

(a) They shall be immediately informed of the charges against them, and be brought before a competent and independent judicial authority as soon as possible, within a reasonable period of time;

(b) They shall enjoy the effective right to judicial determination of the arbitrariness and lawfulness of their detention;

(c) The exercise of the right to judicial oversight of their detention shall not impede the obligation of the law enforcement authority responsible for the decision to detain or to maintain the detention to present suspects before a competent and independent judicial authority within a reasonable period of time. Such persons shall be brought before the judicial authority, which will then evaluate the accusations, the basis of the deprivation of liberty and the continuation of the judicial process;

(d) In the proceedings against them, suspects shall have a right to enjoy the necessary guarantees of a fair trial, access to legal counsel and the ability to present

exculpatory evidence and arguments under the same conditions as the prosecution, all of which should take place in an adversarial process.

94. Where civilians are detained in relation to an international armed conflict, the following conditions are to be ensured:

(a) Reconsideration of a decision to intern or to place in assigned residence alien civilians in the territory of a party to an international armed conflict, or civilians in an occupied territory, or appeal in the case of internment or assigned residence, must be undertaken "as soon as possible" or "with the least possible delay". While the meaning of these expressions must be determined on a case-by-case basis, any delay in bringing a person before the court or administrative board must not exceed a few days and must be proportional in the particular context;

(b) Although the particular procedures for reconsideration or appeal are to be determined by the detaining or occupying Power, such proceedings must always be undertaken by a court or administrative board that offers the necessary guarantees of independence and impartiality, and the processes of which include and respect fundamental procedural safeguards;

(c) Where decisions to intern or to place a civilian in assigned residence are maintained in accordance with the latter proceedings, internment or residential assignment must be periodically reviewed, at least twice a year. Such a review is to be undertaken by a court or administrative board that offers the necessary guarantees of independence and impartiality, and the processes of which include and respect fundamental procedural safeguards;

95. The right of persons detained as prisoners of war to bring proceedings before court without to delay to challenge the arbitrariness and lawfulness of their detention and to receive appropriate and accessible remedy is to be respected, in order to:

(a) Determine whether a person falls within the category of prisoner of war;

(b) Act as a check to ensure that a seriously injured or ill prisoner of war is repatriated or transferred to a neutral State;

(c) Act as a check to ensure that prisoners of war are released and repatriated without delay after the cessation of active hostilities.

96. With regard to detention in relation to a non-international armed conflict:

(a) Administrative detention or internment may only be permitted in the exceptional circumstance where a public emergency is invoked to justify such detention. In such a case, the detaining State must show that:

(i) The emergency has risen to a level justifying derogation;

(ii) Administrative detention is required on the basis of the grounds and procedures prescribed by law of the State in which the detention occurs and is consistent with international law;

(iii) The administrative detention of the person is necessary, proportionate and non-discriminatory, and the threat posed by that individual cannot be addressed by alternative measures short of administrative detention;

(b) A person subject to administrative detention has the right to bring proceedings before a court that offers the necessary guarantees of independence and impartiality, and the processes of which include and respect fundamental procedural

safeguards, including disclosure of the reasons for the detention and the right to defend oneself, including by means of legal counsel;

(c) Where a decision to detain a person subject to administrative detention is maintained, the necessity of the detention must be periodically reviewed by a court or administrative board that offers the necessary guarantees of independence and impartiality, and the processes of which include and respect fundamental procedural safeguards;

(d) Where an internment regime is established, it shall be consistent with international human rights law and international humanitarian law applicable to non-international armed conflict to allow full compliance with the right to bring proceedings before a court.

Guideline 18
Specific measures for children

97. Diversion and alternative measures to the deprivation of liberty, where appropriate, are to be used and given priority. The right to legal and other appropriate assistance is to be ensured so that deprivation of liberty is a measure of last resort and only applied for the shortest appropriate period of time.

98. A safe, child-sensitive environment should be established for children deprived of their liberty. Detained children should be treated with dignity and respect, and in a manner that takes into account any element leading to vulnerability, in particular with regard to girls, younger children, children with disabilities, non-nationals, including migrants regardless of their migration status, refugees and asylum-seeking children, stateless children, trafficked children or children at risk of being trafficked, children from minority, ethnic or indigenous groups and lesbian, gay, bisexual, transgender or intersex children.

99. Effective mechanisms shall be in place to verify the age of persons deprived of their liberty. Assessments are to be conducted in a scientific, safe, child- and gender-sensitive and fair manner, avoiding any risk of violation of the physical and psychological integrity of the child, and giving due respect to human dignity. Prior to the outcome of an assessment, individuals should be accorded the benefit of the doubt such that they are treated as a child. In the event of remaining uncertainty following the outcome of an assessment such that there is a possibility that the individual is a child, she or he should be treated as a child.

100. To ensure that children have prompt and effective access to an independent and child-sensitive process to bring proceedings before a court to challenge the arbitrariness and lawfulness of their detention and to receive without delay appropriate and accessible remedies, the following specific measures shall be enacted:

(a) All legislation, policies and practices related to children deprived of liberty and their right to bring proceedings before a court are guided by the right of the child to have his or her best interests taken as a primary consideration;

(b) Legal or other appropriate assistance, including interpretation, is provided to children deprived of liberty free of charge in all proceedings;

(c) Children who are deprived of their liberty for any reason are able to contact their parents or guardians immediately and are able to consult freely and in full confidentiality with them. It is prohibited to interview such a child in the absence of his or her legal counsel, and parent or guardian, when available;

(d) Information on rights is to be provided in a manner appropriate for the child's age and maturity, in a language and a means, mode or format that the child

can understand and in a manner that is gender- and culture-sensitive. The said information should in addition be provided to parents, guardians or caregivers of the child;

(e) Any child deprived of his or her liberty has the right to bring a complaint in his or her own name or, if it is in his or her best interests, through a representative or an appropriate body. Children are to be allowed to be heard either directly or through a representative or an appropriate body in any proceedings. Wherever possible, children should have the opportunity to be heard directly. If children choose to be heard through a representative, steps are to be taken to ensure that their views are transmitted correctly to the competent body and that the representative is aware that he or she represents exclusively the interests of the child;

(f) National laws should stipulate measures aimed at the prevention of ill-treatment or intimidation of a child who brings or has brought such a complaint, and should provide for sanctions against persons in violation of such laws;

(g) The child has the right to have the matter determined in the presence of his or her parents or legal guardian, unless such an arrangement is not considered to be in the best interests of the child. In cases of conflict of interest, courts and relevant complaint mechanisms should be empowered to exclude parents and/or legal representatives from proceedings and to appoint an ad hoc legal guardian to represent a child's interests;

(h) Each case from the outset is to be handled expeditiously, without any unnecessary delay. Decisions are to be rendered as soon as possible, and no later than two weeks after a challenge has been made;

(i) The privacy and personal data of a child who is or who has been involved in judicial or non-judicial proceedings and other interventions should be protected at all stages, and such protection should be guaranteed by law. This generally implies that no information or personal data may be made available or published by the competent authorities that could reveal or indirectly enable the disclosure of the child's identity, including images of the child, detailed descriptions of the child or the child's family, names or addresses of the child's family members and audio and video records.

Guideline 19
Specific measures for women and girls

101. Applicable and appropriate measures shall be taken to provide accessibility and reasonable accommodation ensuring the right of all women and girls to equal and fair access of the right to bring proceedings before a court to challenge the arbitrariness and lawfulness of detention and to receive without delay appropriate and accessible remedies. These measures include:

(a) Introducing an active policy of incorporating a gender equality perspective into all policies, laws, procedures, programmes and practices that are designed to protect the rights and specific status and distinct needs of women and girls who are subject to the deprivation of their liberty;

(b) Taking active steps to ensure that, where possible, persons who possess education, training, skills and experience in the gender-specific needs and rights of women are available to provide legal aid, advice and court support services in all legal proceedings to female detainees.

102. The practice of keeping girls and women in detention for the purpose of protecting them from risks of serious violence (protective custody) should be eliminated. Alternative measures are to ensure the protection of women and girls without jeopardizing their liberty.

Guideline 20
Specific measures for persons with disabilities

103. The involuntary committal or internment of persons on the grounds of the existence of an impairment or perceived impairment, particularly on the basis of psychosocial or intellectual disability or perceived psychosocial or intellectual disability, is prohibited. States shall take all necessary legislative, administrative and judicial measures to prevent and remedy involuntary committals or internments based on disability.

104. Where a person with a disability is deprived of his or her liberty through any process, that person is, on an equal basis with others, entitled to guarantees in accordance with international human rights law, necessarily including the right to liberty and security of person, reasonable accommodation and humane treatment in accordance with the objectives and principles of the highest standards of international law pertaining to the rights of persons with disabilities.

105. A mechanism complete with due process of law guarantees shall be established to review cases of placement in any situation of deprivation of liberty without specific, free and informed consent. Such reviews are to include the possibility of appeal.

106. Measures shall be taken to ensure accessibility and the provision of reasonable accommodation to persons with disabilities in their place of deprivation of liberty, including the following guarantees:

(a) Persons with a physical, mental, psychosocial, intellectual or sensory disability deprived of their liberty are to be treated with humanity and respect, and in a manner that takes into account their needs by the provision of reasonable accommodation in order to facilitate their effective procedural performance;

(b) All health and support services, including all mental health-care services, are to be provided based on the free and informed consent of the person concerned. The denial of legal capacity of persons with disabilities and detention in institutions against their will, without their consent or with the consent of a substituted decision-maker constitutes arbitrary deprivation of liberty in violation of international law. Perceived or actual deficits in mental capacity, namely, the decision-making skills of a person that naturally vary from one to another, may not be used as justification for denying legal capacity, understood as the ability to hold rights and duties (legal standing) and to exercise those rights and duties (legal agency);

(c) Persons with disabilities are to have access to, on an equal basis with other persons subject to detention, the physical environment, information and communications, and other facilities provided by the detaining authority. Accordingly, all relevant measures are to be taken, including the identification and removal of obstacles and barriers to access, so that persons with disabilities who are deprived of their liberty may live independently and participate fully in all aspects of daily life in their place of deprivation of liberty;

(d) Accessibility should also take into account the gender and age of persons with disabilities, and equal access should be provided regardless of the type of impairment, legal status, social condition, gender and age of the detainee;

(e) Persons with disabilities shall be provided with legal or other appropriate support, including interpretation and peer support mechanisms, so that

individuals receiving services in mental health facilities or residential facilities of any kind may be informed about their rights and remedies under domestic and international law, including those contained in the present Basic Principles and Guidelines, and organizations may act on behalf of those detained against their will.

107. The following measures shall be taken to ensure procedural accommodation and the provision of accessibility and reasonable accommodation for the exercise of the substantive rights of access to justice and equal recognition before the law:

(a) Persons with disabilities shall be informed about, and provided access to, promptly and as required, appropriate support to exercise their legal capacity with respect to proceedings related to the detention and in the detention setting itself. Support in the exercise of legal capacity is to respect the rights, will and preferences of persons with disabilities and should never amount to substituted decision-making;

(b) Persons with psychosocial disabilities are to be given the opportunity to stand trial promptly, with support and accommodations as may be needed, rather than declaring such persons incompetent;

(c) Persons with disabilities are to have access, on an equal basis with other persons subject to detention, to buildings in which law enforcement agencies and the judiciary are located. Jurisdictional entities must ensure that their services include information and communication that is accessible to persons with disabilities. Appropriate measures shall be taken to provide signage in Braille and in easy to read and understand forms of live assistance and intermediaries, including guides, readers and professional sign language interpreters, to facilitate accessibility to communication in the facilities of jurisdictional entities;

(d) Individuals who are currently detained in a psychiatric hospital or similar institution and/or subjected to forced treatment, or who may be so detained or forcibly treated in the future, must be informed about ways in which they may effectively and promptly secure their release, including injunctive relief;

(e) Injunctive relief should consist in an order requiring the facility to release the person immediately and/or to cease immediately any forced treatment and anysystemic measures, such as those requiring mental health facilities to unlock their doors and to inform persons of their right to leave, and establishing a public authority to provide for access to housing, means of subsistence and other forms of economic and social support in order to facilitate de-institutionalization and the right to live independently and be included in the community. Such assistance programmes should not be centred on the provision of mental health services or treatment, but free or affordable community-based services, including alternatives that are free from medical diagnosis and interventions. Access to medications and assistance in withdrawing from medications should be made available for those who so decide;

(f) Persons with disabilities are provided with compensation, as well as other forms of reparations, in the case of arbitrary or unlawful deprivation of liberty. The said compensation is also to take into account the damage caused by lack of accessibility, denial of reasonable accommodation or lack of health care and rehabilitation that have affected persons with a disability deprived of liberty.

Guideline 21

Specific measures for non-nationals, including migrants regardless of their migration status, asylum seekers, refugees and stateless persons

108. Any restrictions on the liberty of non-nationals, including migrants regardless of their migration status, asylum seekers, refugees and stateless persons, is to be a measure of last resort, necessary and proportionate, and imposed only where less restrictive alternatives have been considered and been found to be inadequate to meet legitimate purposes.

109. All individuals who find themselves in the territory or subject to the State's jurisdiction shall be guaranteed effective and free access to the courts of law. This includes the right:

(a) To be informed orally and in writing of the reasons for detention, and on the rights of persons in detention, including the right to challenge the arbitrariness and lawfulness of detention, in a language, means, mode or format that the person detained understands. This may require the provision of information through qualified interpreters and translators at no cost to the detainee and the publicizing of information, including through posters and television monitors in places of detention;

(b) To bring proceedings, either personally or through a representative, before a court to challenge the necessity, proportionality, arbitrariness and lawfulness of detention and to receive without delay appropriate and accessible remedies;

(c) To contact, and be contacted by, any interested parties that might be able to address their needs and to provide them with relevant information or legal assistance, including providing facilities to meet with such persons. This is particularly important where migrant detention facilities are located in remote locations far from population centres. In such situations, mobile courts and video conferencing may be used to gain accessibility to a court of law but do not preclude the right of a detained person to appear in person before a judge.

110. The monitoring of all places of immigration detention and public reporting by relevant United Nations agencies, regional and international human rights mechanisms, national human rights institutions, non-governmental organizations and consular officials (conditional upon request by persons in immigration detention) shall be permitted to ensure that the exercise of the right to bring proceedings before court to challenge the lawfulness and arbitrariness of detention and to receive appropriate remedies is accessible and effective.

111. Decisions regarding the detention of non-nationals are to take into account also the effect of the detention on the physical and mental health of the said persons. When physical and mental security cannot be guaranteed in detention, authorities should provide alternatives to detention.

112. All decisions and actions taken in relation to non-nationals below the age of 18, whether accompanied or unaccompanied, shall be guided by the right of the child to have his or her best interests taken as a primary consideration, and shall accord with the specific protections afforded to children in the present Basic Principles and Guidelines.

113. National legislative frameworks and migration policies shall reflect that the detention of children because of their or their parent's migration status always constitutes a violation of the rights of the child, and contravenes the right of the child to have his or her best interests taken as a primary consideration.

114. Unaccompanied children who are non-nationals shall be informed about their legal status to ensure that they fully understand their situation. Public defence services and/or

guardians made available to children are to be adequately trained to work with children, particularly taking into account the extreme vulnerability and need for care, and are to speak a language they understand. Children who are non-nationals should not be placed in detention centres or shelters for migrants, but in non-custodial community-based alternatives to detention, where they may receive all services necessary for their protection, such as adequate nutrition, access to quality education and leisure, care, physical and psychological medical care and security. Special attention should be given to family reunification.

115. In the case of migrants in an irregular situation, the scope of the judicial review should not be confined to a formal assessment of the migrant's current migration status, but also include the possibility of release if detention is determined to be unnecessary, disproportionate, unlawful or arbitrary.

116. In the case of asylum seekers, the scope of judicial review should recognize that there is a right to seek asylum under international law and that, given that it is neither an unlawful nor a criminal act, it cannot be invoked as grounds for their detention. Asylum seekers and refugees are to be protected from penalization for their illegal entry or stay in accordance with international refugee law, including through the use of detention.

Guideline 22
Implementation measures

117. Legislative, administrative, judicial and other measures, including through the development of common law principles, shall be adopted to give effect to the present Basic Principles and Guidelines to ensure that the rights and obligations contained in them are always guaranteed in law and practice, including in the event of a public emergency threatening the life of the nation and the existence of which has been officially proclaimed.

118. The above-mentioned measures shall include a review of existing legislative, administrative and other provisions to assess compatibility with the present Basic Principles and Guidelines. The country visits of the Working Group on Arbitrary Detention present an opportunity to engage in direct dialogue with the Government of the State in question and with representatives of civil society with the aim ofassisting in the implementation of the principles and guidelines.

119. For the proper implementation of these guarantees, States are encouraged to promote appropriate training for those working in the field of the administration of justice, including police and prison staff. This measure also includes providing training to judges, tribunal and legal officers on how to apply customary international law and rules from the International Convention on Civil and Political Rights, as well as relevant international standards. The Working Group on Arbitrary Detention stands ready to assist in fulfilling this duty of States.

120. Legislation shall be enacted to consider a crime any act or omission that impedes or restricts the right of anyone deprived of his or her liberty to bring proceedings before a court to challenge the arbitrariness and lawfulness of detention and to receive without delay appropriate and accessible remedies.

121. Violations of the rights enshrined in the present Basic Principles and Guidelines shall be investigated, prosecuted and punished.

122. The present Basic Principles and Guidelines shall be widely disseminated, including to justice sector actors, the community and to national human rights institutions, national preventative mechanisms, statutory oversight authorities and other institutions or organizations with a mandate to provide accountability, oversight or inspections to places of deprivation of liberty. Accessible formats for the mentioned dissemination must also be

considered. The Office of the High Commissioner is respectfully requested to further the dissemination of the Basic Principles and Guidelines.